

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

MidAmerican Energy Company,)	
Nicor Energy, L.L.C.,)	
AES New Energy, Inc., and the)	
National Energy Marketers Association)	
)	Docket No. 02-0290
Request for Expedited Rulemaking)	
Regarding Telephonic and Internet)	
Enrollment Procedures Consistent with)	
§ 2EE of the Consumer Fraud and)	
Deceptive Business Practices Act)	

STAFF OF THE ILLINOIS COMMERCE COMMISSION’S REPLY TO
MIDAMERICAN ENERGY COMPANY, NICOR ENERGY, L.L.C.,
AES NEW ENERGY, INC., AND THE NATIONAL ENERGY MARKETERS
ASSOCIATION VERIFIED RESPONSE AND REQUEST FOR DENIAL OF THE
MOTION TO DISMISS OF STAFF OF THE ILLINOIS COMMERCE COMMISSION
AND PEOPLES ENERGY SERVICES CORPORATION RESPONSE TO STAFF’S
MOTION TO DISMISS THE PETITION FOR EXPEDITED RULEMAKING

The Staff of the Illinois Commerce Commission (“Staff” and “Commission”), by and through its attorneys, responds to the MidAmerican Energy Company, Nicor Energy, L.L.C., AES New Energy, Inc., and the National Energy Marketers Association Verified Response and Request for Denial of the Motion to Dismiss of Staff of the Illinois Commerce Commission (“Petitioners” and “Petitioners’ Response”) and the Peoples Energy Services Corporation Response to Staff’s Motion to Dismiss the Petition for Expedited Rulemaking (“PE Services” and “PE Services’ Response”), stating as follows.

Staff is disturbed that Petitioners’ Response attempts to characterize “discussions among the attorneys” at a Staff-led workshop in a separate, related proceeding (MidAmerican Energy Company, Docket No. 01-0844). Petitioners’ Response at 2-3. Petitioners are well aware that workshops are informal, off-the-record efforts to

encourage collaborative solutions. Petitioners' Response doubly disadvantages Staff, first by mischaracterizing the workshop discussions and second by challenging Staff to betray workshop confidences and correct the erroneous account. Staff, respecting these confidences, understandably declines the opportunity.

PE Services' Response also disadvantages Staff by "address[ing] both Staff's Motion and Comments" Regarding Petition, PE Services' Response at 1, intermingling otherwise-distinct legal and policy issues. (Petitioners' Response is similarly and unnecessarily policy-focused.) Staff's present reply addresses legal issues only; it appropriately reserves policy concerns for future reply comments.

I. PROMULGATED RULES REGARDING TELEPHONIC-ENROLLMENT PROCESS DO NOT SATISFY THE REQUIREMENTS OF SECTION 2EE OF THE CONSUMER FRAUD AND DECEPTIVE BUSINESS PRACTICES ACT

Staff's Motion to Dismiss Petition reminds that Section 16-115A of the Public Utilities Act, 220 ILCS 5/1-101 *et seq.*, requires "verifiable authorization from a [retail-electric] customer, in a form or manner approved by the Commission consistent with Section 2EE of the Consumer Fraud and Deceptive Business Practices Act, [815 ILCS 505/1 *et seq.* ("Fraud Act"),] before the customer is switched from another supplier" and that Fraud Act Section 2EE permits "the customer's written authorization" on a "signed" form only. Sections 5-115 and -120 of the Electronic Commerce and Security Act, 5 ILCS 175/1-101 *et seq.*, permit the substitution of electronic writings and signatures, respectively, unless there exists "a construction of a rule of law that is clearly inconsistent with the manifest intent of the lawmaking body or repugnant to the context of the same rule of law[.]" Motion to Dismiss Petition at 2.

PE Services alleges that “Staff fails to show how the telephonic enrollment methodology Petitioners propose where the conversation is recorded and available for transcription is ‘inconsistent with the manifest intent’ or ‘repugnant’ to Section 2EE.” PE Services’ Response at 3. Yet the Illinois General Assembly’s “manifest intent” is expressly stated. When subscribers change telecommunications carriers, the General Assembly provides that they may do so by “written or electronically signed authorization”, “electronic authorization”, or “oral authorization”. Public Utilities Act Section 13-902. But when subscribers change electric-service providers, parallel provisions require that they do so by “written authorization” on a “signed” form only. Fraud Act Section 2EE. When these two Sections are read in concert (an exercise PE Services conveniently sidesteps), the General Assembly’s intentions are clear and unambiguous.¹

(If “Staff did not and cannot cite Fraud Act case law supporting its position that telephonic enrollment violates Section 2EE,” as PE Services’ Response alleges at 3, it is only because Petitioners are the first parties in the Section’s five-year history to suggest that a telephone “call back” might somehow amount to a writing or signature. Petition Requesting the Expedited Promulgation of a Rule by Petitioners at 10. PE Services, unable to locate its own case law supporting Petitioners’ problematic position, bends dictionary definitions instead. PE Services’ Response at 3.)

PE Services and Petitioners try to conceal telephonic enrollment’s statutory conflicts by framing the promulgated rules as a policy concern, not a legal problem. PE Services states that “The Commission has already established policy that telephonic

¹ The Public Utilities Act is silent regarding subscriber-change authorizations in gas-choice pilot programs. It does not prohibit written, electronic, or oral authorizations.

customer enrollment for energy services is safe and reliable[,]” PE Services’ Response at 2, while Petitioners warn that “The failure of the Commission to address and redress these issues would perpetuate the virtually insurmountable market barriers facing existing market participants, and further discourage potential new energy providers from entering the Illinois market.” Petitioners’ Response at 3. (Staff shares similar views, as its Comments Regarding Petition suggest at 3.) But however timely and important policy preferences may be, they cannot substitute when statutory authority is lacking.

II. PROMULGATED RULES REGARDING INTERNET-ENROLLMENT PROCESS DO NOT SATISFY THE REQUIREMENTS OF RECENT COMMISSION DELIVERY-SERVICES TARIFF ORDERS

PE Service and Petitioners do not refute Staff’s legal position: the promulgated rules regarding internet enrollment interfere with the Commission’s delivery-services tariff (“DST”) orders, which anticipate and require Staff-initiated workshops to develop internet-enrollment provisions, presumably for tariff inclusion. While PE Services may be correct that “the electric delivery service tariff orders are not *res judicata* on this petition for rulemaking[,]” PE Services’ Response at 4, and Petitioners observe that “nothing in those orders suggests that a rulemaking on the issues should be subject to summary dismissal,” these parties seem unwilling to accept that the Commission’s seven DST orders, taken together, affirmatively anticipate internet-enrollment workshops and tariff-based solutions.² Nowhere do the orders invite or support Petitioners’ proposed rulemaking.

² Ameren Companies, Order in Docket No. 00-0802; Commonwealth Edison Company, Interim Order in Docket No. 01-0423 at 148; Illinois Power Company, Order in Docket No. 01-0432 at 130; MidAmerican Energy Company, Order in Docket No. 01-0444 at 21; Central Illinois Light Company, Order in Docket Nos. 01-0465, -0530, and -0637 consolidated at 101; Mount Carmel Public Utility Company, Order in Docket Nos. 01-0525 and -0625 consolidated; and Alliant Companies, Order in Docket Nos. 01-0528, -0628, and -0629 consolidated at 15-16.

Staff states in its Motion to Dismiss Petition that it “cannot support, and understands the Commission’s recent DST orders not to permit, Petitioners’ rulemaking as a substitute for Staff-led internet-enrollment workshops and the tariff-based solutions they may generate.” Motion to Dismiss Petition at 7. Its position remains unchanged and unrefuted.

WHEREFORE, for the foregoing reasons, Staff respectfully reaffirms its request that the Motion to Dismiss Petition be granted.

Respectfully submitted,

ANDREW G. HUCKMAN
STEVEN L. MATRISCH
Attorneys for the staff of the
Illinois Commerce Commission

Office of General Counsel
Illinois Commerce Commission
160 North La Salle Street
Suite C-800
Chicago, Illinois 60601
(312) 793-2877

June 19, 2002